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80-1457

No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERT L. HARDIN - - - - Petitioner

versus

PITNEY-BOWES, INCORPORATED - Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The District Court for the Western District of Kentucky granted a Summary Judgment to the Defendant, Pitney-Bowes, Incorporated, in an Age Discrimination in Employment Act of 1967, 29 U.S.C. # 621 *et seq.* on the grounds that the Plaintiff had not sustained the burden of showing that the discrimination was *prima facie unlawful* (see Appendix). The Plaintiff by pleadings and deposition presented fact disputes concerning defendant's "business reasons" for discharging him. The two questions presented are:

1. Once a Plaintiff has presented a *prima facie* case of discrimination, in accordance with *McDonnell Douglas Corp.* v. *Green,* 93 S. Ct. 1817 (1973); *Furnco Construction Corp.* v. *Waters,* 98 S. Ct. 2943 (1978) and *Board of Trustees of Keene State College* v. *Sweeney,* 99 S. Ct. 295 (1978), can a judge grant a Summary Judgment based on the Defendant's affidavits in contradiction of such *prima facie* case?

2. Once a Plaintiff has placed at issue both the motive and intent of a company and/or its supervisor in a discrimination case, and therefore raises the issue of the Defendant's state of mind, can a judge deny the Plaintiff's right to cross-examine such parties in open court?

The United States Court of Appeals for the Sixth Circuit may have, by a 2 to 1 decision, held yes.

The Petitioner and Chief Judge Edwards of the United States Court of Appeals for the Sixth Circuit, by way of a convincing dissenting opinion, contends the answer is no.

PARTIES BELOW

Statement Required by Supreme Court of United States Rule 21.1(b):

The Appellee in the United States Court of Appeals for the Sixth Circuit was Pitney-Bowes, Incorporated, which was the Defendant in the District Court for the Western District of Kentucky.

This Petitioner, Robert L. Hardin, was the Appellant in the United States Court of Appeals for the Sixth Circuit and was the Plaintiff in the District Court for the Western District of Kentucky.

The Petitioner, Robert L. Hardin, has served Copies of all appellate papers on the Appellee.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No.

ROBERT L. HARDIN - - - - *Petitioner*

v.

PITNEY-BOWES, INCORPORATED - - *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COUPT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, Robert L. Hardin, respectfully prays that a writ of certiorari issue to review the final order and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on November 28, 1980.

OPINION BELOW

The order and opinion of the Court of Appeals, not yet reported, is in the Appendix hereto. The pertinent memorandum and order of the District Court for the Western District of Kentucky also appear in the Appendix.

JURISDICTION

The final order of the Court of Appeals for the Sixth Circuit was dated and entered on November 28,

1980, and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. # 1254(1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. #621 et seq.
28 U.S.C. # 1254(1)

STATEMENT OF THE CASE

The Petitioner was discharged by the Respondent on July 19, 1975 after 8½ years of employment as a Salesman. At the time of his discharge he was 53 years of age.

The Petitioner prior to 1975, the year in which he was discharged, had been one of the top salesmen in the Louisville Office of the Respondent and even in March of 1975 received an award as top salesman of the month for the Louisville Office.

The admitted facts showed that for the months of January, February, April, May and June of 1975 the Petitioner's sales were below the quota of $7,200.00 per month sales volume as established by the Respondent through its District Sales Manager. The Petitioner did not object to the sales volume quota, but offered reasons for his failure to meet said quotas. Those reasons were that the Respondent had given poor service on a large sale made by Petitioner in 1974 which was charged back to him in early 1975 and due to a recession, the type of equipment being sold by the Petitioner for the Respondent had been seriously

affected by the economy. In spite of the outside forces affecting the Petitioner's attaining the quota, he did in July of 1975 reach a sales volume which equaled 83% of the quota set by the Respondent. The Petitioner was discharged in July of 1975, 1½ years prior to his vesting in the Respondent's Pension Plan.

By way of the Deposition of the Petitioner and the Defendant's response to interrogatories, the Petitioner established these facts:

1. The Petitioner belonged to the protected class (between the age of 40 to 65);
2. The Petitioner was qualified for the job (he had been one of the Louisville District's top salesmen prior to 1975 and was the top salesman for March of 1975 in the Louisville District);
3. The Petitioner was terminated;
4. The Respondent sought younger people for the job (the percentage of the work force over 40 years of age dropped from 37% to 25% of the total work force from 1974 to 1975. Additionally 50% of the persons terminated by Respondent in 1974 and 1975 were over 40 years of age); and
5. There is statistical evidence in the record showing a pattern and practice of age discrimination on the part of the Respondent. In response to interrogatories the Respondent showed that from 1971 to 1976 the total percentage of its nationwide sales work force over

40 years of age declined from 47% to 29%. The percentage of new hires over 40 years of age between 1972 to 1976 declined from 19% to 9%.

The District Court for the Western District of Kentucky granted a Summary Judgment to the Respondent and issued a Memorandum Opinion in Support thereof (see Appendix).

The Court of Appeals for the Sixth Circuit affirmed the District Court by a 2 to 1 ruling with Chief Judge Edwards dissenting (see Appendix).

ARGUMENT

1. The Court Below Erred in the Standard Used in Granting a Summary Judgment in an Age Discrimination Case in Direct Conflict With the Holding of the Decisions of This Court.

The court below based its granting of a Summary Judgment on *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (8th Cir., 1977) and *Bishop* v. *Jelleff Associates*, 398 F. Supp. 579 (D.D.C., 1974). Both of these cases are authority for the burden of proof at a trial and are not authority for the granting of a Summary Judgment.

In *McDonnell Douglas Corp.* v. *Green*, 93 S. Ct. 1817 (1973), *Furnco Construction Corp.* v. *Waters*, 98 S. Ct. 2943 (1978) and *Board of Trustees of Keene State College* v. *Sweeney*, 99 S. Ct. 295 (1978), this Court has held that a plaintiff's duty to prove a prima facie case of discrimination can be satisfied by showing:

(1) he belongs to the protected class
(2) he was qualified for the job
(3) he was terminated
(4) Employer seeks younger people for the job.

All the above was proved by the Petitioner. The Respondent's only defense was that there was a "business reason." Based on this the Court below granted a Summary Judgment.

In *Furnco Construction Corporation* v. *Waters,* 98 S. Ct. 295 (1978) this court held that the presentation of a "business reason" for the discharge does not necessarily end the inquiry into employment discrimination but, rather, a plaintiff must be given the opportunity to introduce evidence that the proffered justification is merely a pretext for discrimination. The Petitioner did not get this opportunity in the case at bar and was denied his right to present evidence as to the pretext of the Respondent's "business purpose" for his discharge.

This Court has recently questioned the appropriateness of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchison* v. *Proxmire,* 443 U. S. 111, 120 n. 9 (1979); *Wolston* v. *Reader's Digest Association, Inc.,* 443 U. S. 157, 161 n. 3 (1979).

The Respondent's state of mind was in issue before the District Court. The granting of a summary judgment before the Petitioner presented any evidence on the Respondent's state of mind was clearly in error.

2. The Decision Below Is in Conflict With the Age Discrimination in Employment Act of 1967.

The Age Discrimination in Employment Act of 1967 did not establish a lawful and unlawful age discrimination. All discrimination is unlawful under the act.

The Court below in its Memorandum (see Appendix) misunderstood or refused to apply the correct standard when it wrote:

> "Conceding arguendo that *age discrimination was present,* Plaintiff has not sustained the burden of showing that the discrimination was prima facie unlawful."

The Court was stating that there can be lawful age discrimination. This is simply not the law.

3. The Decision of the United States Court of Appeals for the Sixth Circuit Is in Conflict With the Decisions of Other Courts of Appeals as Well as Its Own Decisions.

Chief Judge Edwards of the United States Court of Appeals for the Sixth Circuit in his dissenting opinion (see Appendix) ably recited Chief Judge Colman of the Fifth Circuit in *Hayden* v. *First National Bank of Mt Pleasant, Tex.,* 595 F. 2d 994, 997 (5th Cir. 1979):

> "When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party, granting a summary judgment is especially ques-

> tionable. In these cases 'summary judgment should be used cautiously and all procedural requirements given strict adherence. . . .' Lavin v. Illinois High School Association, 7 Cir. 1975, 527 F. 2d 58, 61 '[O]rdinarily summary disposition of Title VII cases is not favored, especially on a "potentially inadequate factual presentation."' Logan v. General Fireproofing Co., 4 Cir. 1971, 521 F. 2d 881, 883, quoting William v. Howard Johnson's Inc. of Washington, 4 Cir. 1963, 323 F. 2d 102, 105."

The case at Bar falls squarely within this line of cases.

It is of particular importance that the Sixth Circuit in its prior holdings in *S. J. Groves & Sons Company* v. *Ohio Turnpike Commission,* 315 F. 2d 235, 237 (6th Cir. 1963), as set out by Chief Judge Edwards in his dissenting opinion, has held.

> "This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kensey, 249 F. 2d 797 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F. 2d 425,

427 C.A. 6th; Begnaud v. White, 170 F. 2d 323, 327 C. A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F. 2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F. 2d 280, 283, C.A. 6th; Hay v. Progress Pattern Co., 217 F. 2d 701, 704, C.A. 6th; See Sartor v. Arkansas Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; White Motor Co. v. United States, 83 S. Ct. 696."

The 6th Circuit has failed to apply its own precedence to the case at bar.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the final order and opinion of the Sixth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT

FORE THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 76-0435-L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES, INCORPORATED - - - *Defendant*

ORDER—Entered October 18, 1978

For the reasons set out in the Memorandum filed this date,

IT IS ORDERED that the motion of the defendant, Pitney-Bowes, Incorporated, for summary judgment be and it hereby is granted, and this action is dismissed with prejudice at the cost of the plaintiff.

There is no just reason for delay, and this is a final and appealable Order.

This 18th day of October, 1978.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES DISTRICT COURT

FORE THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

No. C 76-0435-L(B)

ROBERT L. HARDIN - - - - - - - *Plaintiff*

v.

PITNEY-BOWES, INCORPORATED - - - *Defendant*

MEMORANDUM—Entered October 18, 1978

This action was brought by plaintiff against his employer alleging that he was discriminatorily discharged because of his age in violation of 29 U.S.C. Section 623. He was 53 at the time of his discharge. Defendant employer has moved for summary judgment.

Plaintiff had been employed by defendant for about 8½ years prior to his termination. In April, 1975, a new branch manager, Monte Moon, took over defendant's office in Louisville. Apparently on his first day in Louisville, Moon met with plaintiff to discuss what Moon thought was plaintiff's unsatisfactory sales performance. Plaintiff acknowledges that defendant had set up a monthly sales quota of $7200.00 for its salesmen, and he further admits that he was "comfortable" with that figure.

In his deposition, plaintiff conceded that his sales figures were about $14,000.00 below his quota in the first quarter of 1975. As a result of this drop, plaintiff's draw was cut, probably in February. He testified to "a friendly discussion" with Moon's predecessor, at which the $7200.00

monthly quota was probably discussed, but no definitive action was taken.

On April 15, 1975, an Employee Problem Discussion was held. At the conference were Moon, Harry Brown, the Regional Manager, Bob Widman, Brown's assistant, and plaintiff. Plaintiff testified that there was discussion of his unsatisfactory sales performance and that he "was being put on notice" (Deposition of Plaintiff p. 24). He interpreted this to mean that if a review of his performance every 30 days showed that he was not meeting his quota, he would be terminated. A memorandum of the substance of the discussion was prepared and signed by all parties present. The memorandum concluded with the sentence, "If Mr. Hardin does not meet the above requirements, termination will result" (Exhibit to Deposition).

On June 12, 1975, plaintiff was notified that his production during the two months following the Employee Problem Discussion had been only $6,000.00. He was warned that if he did not meet the $7200.00 quota by July 14, he would be terminated. When he failed to make the quota by July 14, he was asked to resign. Upon his refusal to resign, he was discharged (Deposition of Plaintiff, p. 40 et seq.).

Plaintiff acknowledged in his deposition that his monthly draw, which had been cut from $1,000 to $500, still exceeded his commissions from February, 1975, until his discharge (Deposition, p. 42).

In order for plaintiff to prevail in an age discrimination case, the burden is on him to make a prima facie case of unlawful discrimination. *Moses* v. *Falstaff Brewing Corp.*, 550 F. 2d 1113 (8th Cir. 1977). In the case at bar, conceding arguendo that age discrimination was present, plaintiff has not sustained the burden of showing that the discrimination was prima facie unlawful. The ADEA provides that it is not unlawful to discharge an individual for good cause. 29 U.S.C. Section 623(f)(3). A decision to discharge which

was based on a rational business decision does not constitute a violation of the Act. *Bishop* v. *Jelleff Associates*, 398 F. Supp. 579 (D.D.C. 1974).

A reading of the plaintiff's deposition, coupled with an examination of the entire record, compels the conclusion that plaintiff's discharge was for failure to perform his duties in a satisfactory manner and was not the result of age discrimination by the defendant. Accordingly, defendant's motion for summary judgment will be granted.

An appropriate Order has been entered this 18th day of October, 1978.

(s) Thomas A. Ballantine, Jr.
United States District Judge

Copies to:

Counsel of record

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 78-3679

ROBERT L. HARDIN, - - - *Plaintiff-Appellant*

v.

PITNEY-BOWES, INCORPORATED, - *Defendant-Appellee*

ORDER—Filed November 28, 1980

Before: EDWARDS, Chief Judge; KEITH and BROWN, Circuit Judges.

This action was brought under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* Appellant Hardin alleged that at the age of 53 he was unlawfully discharged from his job as a salesman with appellee Pitney-Bowes due to his age. The district court granted Pitney-Bowes' motion for summary judgment.

Hardin contended before this court that the district court should not have granted Pitney-Bowes' motion for summary judgment because there was a genuine factual issue. Hardin further contends that he was denied discovery.

Pitney-Bowes showed through deposition and affidavit that, without dispute, Hardin had agreed to make minimum sales of $7200 per month and that Hardin, who was on commission basis only, agreed that such was a reasonable quota standard; that Hardin had failed, except for one month, to meet this quota over a six month period and was warned three times that he would be released if he did not

meet it; that of the nine salesmen who were released or quit at around this time, only two, including Hardin, were in the protected class (over forty years of age); that of the six salesmen who were called on the carpet at this time for failure to make quota, only two, including Hardin, were in the protected class; and that of the four who were released for failure to make quota at the same time Hardin was released, only two, including Hardin, were in the protected class.

On this undisputed record we cannot say that the district judge committed error in granting summary judgment to Pitney-Bowes.

Hardin's argument that he should have been allowed to depose Monte Moon, formerly the Pitney-Bowes manager in Louisville who had been transferred to Illinois, in Louisville at Pitney-Bowes' expense is also without merit. Ordinarily, if a plaintiff wishes to depose an employee of a defendant, the plaintiff may not insist that the defendant produce the employee in a city which is not the residence of the employee at the defendant's expense. The plaintiff must go to the witness or pay to bring the witness to the plaintiff. Since Hardin was not willing to do either of these things he cannot properly complain that he was denied discovery.

The decision of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

Issued as Mandate: February 13, 1981

Costs: None

Re: 78-3679

Robert L. Hardin v. *Pitney-Bowes*

EDWARDS, Chief Judge, dissenting. On review of this purely paper record it appears to me that plaintiff, by pleading and deposition, presented fact disputes concerning defendant's "business reasons" for discharging him, which disputes cannot properly be resolved in this age discrimination case without an evidentiary hearing.

Appellant claims that the reason he failed to make his quota in the crucial months at issue was the then existing recession and that the newly hired young sales manager discharged him either because of his age or because he was within 18 months of the vesting of his pension rights with Pitney-Bowes. Thus, I feel that this record has placed at issue both the motive and intent of the company and of the supervisor who was directly responsible for the discharge. As Chief Judge Coleman of the Fifth Circuit recently put the matter:

> When dealing with employment discrimination cases, which usually necessarily involve examining motive and intent, as in other cases which involve delving into the state of mind of a party,[1] granting of summary judgment is especially questionable. In these cases "summary judgment should be used cautiously and all procedural requirements given strict adherence . . ." *Lavin* v. *Illinois High School Association,* 7 Cir. 1975, 527 F. 2d 58, 61. "[O]rdinarily summary disposition of Title VII cases is not favored, especially on a 'potentially inadequate factual presentation'." *Logan* v. *General Fireproofing Co.,* 4 Cir. 1971, 521 F. 2d 881, 883, quoting *Williams* v. *Howard Johnson's Inc. of Washington,* 4 Cir. 1963, 323 F. 2d 102, 105.

Hayden v. *First National Bank of Mt. Pleasant, Tex.*, 595 F. 2d 994, 997 (5th Cir. 1979).

This court, of course, has a strong tradition of insistence on the right of trial in any case which raises a fact dispute. Judge Shackelford Miller phrased the Sixth Circuit standard as follows:

> This Court has on several occasions expressed the view that a trial judge should be slow in disposing of a case of any complexity on a motion for summary judgment, that while such a judgment wisely used is a praiseworthy and timesaving device, yet such prompt dispatch of judicial business is neither the sole nor the primary purpose for which courts have been established, and that a party should not be deprived of an adequate opportunity to fully develop his case by witnesses and a trial, when the issues involved make such procedure the appropriate one. Knapp v. Kinsey, 249 F. 2d 797, 801-803, C.A. 6th; Bohn Aluminum & Brass Corp. v. Storm King Corp., 303 F. 2d 425, 427, C.A. 6th; Begnaud v. White, 170 F. 2d 323, 327, C.A. 6th; Estepp v. Norfolk & W. Ry. Co., 192 F. 2d 889, C.A. 6th; Bellak v. United Home Life Ins. Co., 211 F. 2d 280, 283, C.A. 6th; Hoy v. Progress Pattern Co., 217 F. 2d 701, 704, C.A. 6th. See: Sartor v. Arkansas Gas Corp., 321 U. S. 620, 64 S. Ct. 724, 88 L. Ed. 967; White Motor Co. v. United States, 83 S. Ct. 696.

S. J. Groves & Sons Company v. *Ohio Turnpike Commission*, 315 F. 2d 235, 237 (6th Cir. 1963).

It is particularly inappropriate for summary judgment to be employed where discriminatory motive and intent is the specific claim, countered by the assertion of neutral business reasons. What is at issue in such a case is the

defendant's state of mind.[1] Under such circumstances, the key parties to the dispute ought to be subject to cross examination in open court. The Supreme Court has frequently reminded us of this as shown in the following quotation from an antitrust case:

> It may be that upon all of the evidence a jury would be with the respondents. But we cannot say on this record that "it is quite clear what the truth is." Certainly there is no conclusive evidence supporting the respondents' theory. We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude here that it should not have been granted. We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 472-73 (1962).

In my view, summary judgment should be vacated and the case should be remanded for trial.

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[1]The Supreme Court has recently questioned the appropriateness of deciding defamation cases on summary judgment where the defendant's state of mind is called into question under the "actual malice" standard. *Hutchison* v. *Proxmire*, 443 U. S. 111, 120 n. 9 (1979); *Wolston* v. *Reader's Digest Association, Inc.*, 443 U. S. 157, 161 n. 3 (1979).